JD–11–03
Livonia, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE KROGER COMPANY

and Case 7–CA–45131

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 876, AFL–CIO–CLC

Donna M. Nixon, Esq.,
for the General Counsel.
Terrence J. Miglio and Jonathon A. Rabin, Esqs.,
(Keller Thoma), of Detroit, Michigan,
for the Respondent.
Michael L. O'Hearon, Esq.,
(Klimist, McKnight, Sale, McClow & Canzano, P.C.),
of Southfield, Michigan, for the Charging Party.

DECISION

Statement of the Case

KARL H. BUSCHMANN, Administrative Law Judge. This case was heard on Tuesday, October 22, 2002, in Detroit, Michigan, upon a complaint, dated July 23, 2002. The charge was filed on May 14, 2002, by the United Food and Commercial Workers International Union, Local 876, AFL–CIO–CLC, herein called the Union. The complaint alleges that The Kroger Company violated Section 8(a)(1) and (5) of the National Labor Relations Act, when it failed and refused to furnish to the Union information necessary for and relevant to the Union's ability to carry out its statutory duties as the collective bargaining representative of the employees.

According to the complaint, the Union asked the Respondent for information in two areas, (a) "the number of Michigan marketing area stores that increased the usage of customer U-scans from four to eight," and (b) "an accounting of specialty items, called Kehe items, carried by Michigan area stores." After the closing of the record in this case, the General Counsel joined the Union in requesting the withdrawal of the allegation relating to the Kehe information request. The General Counsel's motion in this regard is hereby granted, requiring a resolution of only the issue relating to the U-scans.

On consideration of the entire record, including post-hearing briefs filed by the General Counsel and the Respondent [motion to file reply briefs is denied], I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Kroger Company, the Respondent, has been engaged in the retail sale of groceries and related products with places of business throughout Michigan and Ohio. The Respondent, which has an office at 18334 Laurel Park Drive, Livonia, Michigan 48152 annually purchases and receives at its Michigan facilities, goods valued in excess of $50,000 directly from points located outside the state of Michigan. I find and conclude that the Respondent has been engaged in commerce and is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. BACKGROUND FACTS

On March 5, 2001, The Kroger Company and the Union reached a tentative bargaining agreement, which expires on June 5, 2004. The agreement has not yet been signed (GC Exh.8).

Prior to the current agreement, the parties also agreed in an exchange of letters to certain issues relating to the use of U-scans. By letter of November 12, 1998, Kroger addressed the Union's concerns about the potential loss of work opportunities due to the installation of U-scan units in Kroger stores (GC Exh. 3). The U-scans, or self-service cash registers, permit customers to check out grocery items on a self-service basis. One pod usually has four U-scan units, which can affect as many as eight union employees, including four cashiers and four "baggers," while only a single employee is required to monitor the activities of all four U-scans.

The Respondent's letter informed the Union that Kroger planned "to install no more than one four-pod unit in new, replacement and updated/remodeled stores." Kroger also agreed that no current full-time clerk-cashiers would have their hours reduced as a direct result of the U-scan installation and agreed to notify the Union of future technological changes (GC Exh. 7).

Since then, the Union has become increasingly apprehensive that its bargaining unit was shrinking significantly. Moreover, James Ristich, executive assistant to the union president, learned from his business agents in the stores that there has been an increase in the installation of U-scan units in Kroger's stores. In response to this new information, Ristich, sent a letter, dated March 21, 2002, to Brian Gasparovich, human resources assistant manager, requesting the following information (GC Exh. 2):

- The volume of the KMA Marketing Area in Local 876's jurisdiction from March 5, 2001 to present.
- The number and location of stores opened in 2001, plus any stores that would open in 2002.
- The number of stores that went from 4 U-Scans or a pod to 8 U-Scans or 2 pods from 3/5/2001 to the present.
- A confirmation of the 300 items of the Kehe line.

Although the information request specified four categories of data, only the latter two were the subject of the complaint in this case, presumably because the first two specifications were provided to the Union. In the meantime, after the closing of the record in this case, the General Counsel and the Union decided also to withdraw the allegation relating to the Kehe information request.

Ristich testified that he had a phone conversation with Gasparovich to inquire about the information request, sometime between March 21st and April 30, 2002. Gasporovich notified Ristich that he was leaving his position as human resources assistant manager, and suggested that Ristich should probably "take [the matter] up with the next person that comes in" (Tr. 38).

On March 28, 2002, the Union filed a grievance, relating to the Kehe issue, that Kroger was stocking more items than the number agreed upon. The matter was handled by Bryan Kittleson, Gasporovich's replacement.

On April 30, 2002, Ristich sent a second information request, this one addressed to Kittleson, requesting the same information originally sought by the March 21st letter (GC Exh. 10). The Union, not having received any response, filed a charge with the NLRB on May 14, 2002, that Kroger had committed an unfair labor practice by failing to furnish the requested information. By letter of May 30, 2002, John M. Flynn, attorney for Kroger, informed the Board's attorney in Region 7, Linda Rabin Hammell, that the information had been provided to the Union. The letter suggests that the delay in responding to Ristich's April 30th letter was due to "a transition in the Human Resources Department" (GC Exh. 15).

On May 31, 2002, Ristich received a letter, dated May 29, 2002, from Kittelson, in response to the April 30 information request, inter alia, stating that the information had been supplied to Andy Johnson, the union president. The relevant language states as follows (GC Exh. 11):

> "Regarding U-Scan installations, it is my understanding that Ken DeLuca had recently provided this information to Andy Johnson."

On September 17, 2002, Ristich faxed and mailed another letter addressed to Kittleson, stating as follows (GC Exh. 12):

> On March 21, 2002 and April 30, 2002, I sent you written requests for information, which still remains outstanding with respect to the following:
>
> 1. The number of stores that went from 4 U-Scans or a pod to 8 U-Scans or 2 pods from 3/5/2001 to present; and
>
> 2. The 300 items of Kehe line.
>
> Despite my repeated follow up requests, the Company has not provided the above information.
>
> In your May 29, 2002 letter, you indicated your belief that, with respect to item 1 above relating to the increase in U-Scans, "Ken DeLuca has recently provided this information to Andy Johnson." I have checked and the Union has not received this information. Please provide it at once.

By letter, dated October 17, 2002, which was hand delivered to the Union, Kroger provided the requested information, namely a list of the 16 stores where a second U-scan was installed (GC Exh.12).

DISCUSSION

Even though the Union ultimately received the requested information, the General Counsel argues that the Respondent violated the Act, first, because the information was not furnished "until after the Complaint issued" and, second "it was provided seven months after the request was made." The Respondent argues that it fully and completely responded to the information request, initially in April 2002 by letter from DeLuca to Andy Johnson, Union president, second by a reminder of May 29 to Ristich, that the information had been sent to the union president, and third by letter of October 17, 2002.

As stated by the General Counsel, the Act requires an employer to furnish information requested by the union when such information is relevant and necessary to the union in carrying out its statutory duties and responsibilities as the employees` bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). The Respondent does not dispute the notion that the U-scan information is relevant to the Union, and the Respondent has not resisted the Union's request on that basis.

The issue is therefore whether the Respondent's response was unreasonably delayed, i.e., whether the Respondent failed to comply with the Union's information request until "seven months after the initial request," as alleged by the General Counsel. The record includes the testimony of Ken DeLuca, Respondent's director of human resources, and that of Rowena Winkel, administrative support person in human resources. According to their testimony, Kroger sent a letter, dated April 12, 2002, to the union president listing the stores where a second U-Scan had been installed (R. Exh. 1). Winkel unequivocally testified that she typed the letter under the direction of DeLuca on that date, and that she mailed the letter on the same day. Similarly, DeLuca testified that he prepared that letter in response to the request of Andy Johnson, president of the Union. Their testimony is consistent and appears plausible.

The General Counsel argues, however, that this information is not credible and belies logic, because the Respondent was certainly on notice on July 23, 2002, when the complaint had been filed, that the Union had not received the information. If the letter had been sent as early as April, the Respondent could have produced the letter during the course of the investigation in this case.

Johnson did not testify in this case and any suggestion that he had not received the letter would be hearsay. Even if the testimony of the Company's witnesses, Winkel and DeLuca were ignored, the record also reveals a letter sent by Kittleson to the Union on May 29, 2002, stating, "it is my understanding that Ken DeLuca has recently provided this information to Andy Johnson" (GC Exh. 11). Clearly, the Respondent had not ignored the Union's request. The Union then waited until September 17, 2002, to renew its request, an indication that the Union contributed to the delay.

In any case, I credit the testimony of the Respondent's witnesses and find that Kroger had complied with the information request. In agreement with the Respondent, I find that the record fails to support the allegations in the complaint.

CONCLUSIONS OF LAW

1. The Respondent, The Kroger Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in any unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

On the basis of the foregoing findings of facts, conclusions of law, and the entire record, I issue the following recommended

ORDER

The complaint is dismissed.

Dated, Washington, D.C., January 28, 2003.

Karl H. Buschmann
Administrative Law Judge